The NLRA in a Technological Society: A Law Not Busy Being Born, Is Busy Dying

William A. Herbert
THE NLRA IN A TECHNOLOGICAL SOCIETY:
A Law Not Busy Being Born, Is Busy Dying

William A. Herbert
Senior Counsel
CSEA Local 1000, AFSCME AFL-CIO
Albany, New York

“That he not busy being born, is busy dying.” Bob Dylan (1965)

Introduction

This paper explores issues related to the impact of new technologies on the application of the National Labor Relations Act (hereinafter “NLRA”). It will examine substantive case law and opinions with regard to: use of workplace computers and e-mail; videotape and photographic surveillance; genetic testing; biometrics; global position systems (GPS) and other technologies used for human tracking. Finally, the paper will discuss the manner that the National Labor Relations Board (hereinafter “NLRB”) can utilize the new technology to fulfill the fundamental purpose of the NLRA.

The development and use of new technologies in our society is growing exponentially. It is symptomatic of our time that as individuals are being subjected to greater technologically based monitoring and regulation, commerce has become increasingly deregulated. Government and media reports demonstrate the increased use of new technologies for monitoring in the workplace, schools and public areas. See, U. S. Government Accounting Office, Employee Privacy: Computer-Use Monitoring Practices and Policies of Selected Companies, GAO-02-717 (September 2002) (study showed that 14 large corporations surveyed monitor and store employee e-mail and internet use); Robinson, Big Brother or Modern Management: E-mail Monitoring in the Private Workplace, 17 Labor Lawyer 311 (2001); Forelle, On the Road Again, But Now the Boss Is Sitting Beside You, The Wall Street Journal, May 14, 2004 (article describes increased employer use of GPS technology to monitor employees); Bergstein, Biometrics Begin to Enter Daily Life, Albany Times Union, August 12, 2004 (article discusses use of a biometric security system at the Statue of Liberty); Richtel, A Student ID That Can Also Take Roll, The New York Times, November 17, 2004 (article describes how school districts are mandating elementary school children to wear ID badges with computer chips for tracking purposes); Adams, Slave to the Machines, Peoria Journal Star, November 9, 2004 (article discusses

1 The opinions expressed in this paper do not necessarily represent the views of CSEA Local 1000, AFSCME, AFL-CIO. A section of this paper has been revised from a paper co-authored with H. David Kelly, Jr. from Beins, Axelrod, Kraft, Gleason & Gibson, Washington, D.C., that was presented at the 2004 ABA Annual Meeting in Atlanta. See, www.bnabooks.com/ababna/annual/2004/kelly.doc
The Right to Organize and the Right to Privacy Under the NLRA In the Technological Age

A discussion relating to the application of the NLRA to new technologies must begin with the central legislative purpose for the NLRA set forth in Section 7: to grant American workers the fundamental right to form, join or assist labor unions and to engage in concerted activities for mutual aid and protection. 29 U.S.C. 157. Section 7 provides that:

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a)(3) of this Title.

In NLRB v. J. Weingarten, 420 U.S. 251, 265, n.10 (1975), the United States Supreme Court recognized that technological advances in the workplace necessitate that the NLRB reappraise how such advancements impact the statutory rights granted under the NLRA. At the time of the NLRA’s enactment in July 1935, the possibility of computer-based technologies was relegated to the imagination of science fiction writers. Seventy years since the NLRA’s enactment, there is reason to doubt whether the NLRB is keeping pace with “the current technological reality” recognized in Ashcroft v. American Civil Liberties Union, 542 U.S.__,124 S. Ct. 2783 (2004).

In order to meet the fundamental purpose of the NLRA, these new technological developments should be analyzed based on the changing nature of the workplace along with the overwhelming intrusive potential of the technologies. The decentralization of worksites through computer networks warrants a reevaluation of the application of the balance between the statutory right to organize and an employer’s common law property interests. Workplace technologies can provide the means of restoring the statutory guarantee for a truly free election process without the current employer domination. Through technology, the representation process could be modernized to insure a fair and equal playing field leading up to an NLRB election.

Finally, the advent of new technologies supports a reevaluation of the right to privacy under the NLRA. In the technological age, when positive technological advancements can be transformed into a vehicle to invade an employee’s privacy, a fresh look at employee privacy rights is warranted. See Marx, Now the Techno-Snoopers Want to Get Into Our Genes, Los Angeles Times, September 15, 1989.
At one time, an employee’s right to privacy against invasion by his or her employer was understood to constitute an inherent protected right under Section 7. *Standard-Coosa-Thatcher Co*, 85 NLRB 1358, 24 LRRM 1575 (1949). Nevertheless, some NLRB and court precedent has metamorphosed the concept of a statutory “right to privacy” into a management tool for defeating union organizing efforts. *Decaturville Sportswear Co. v. NLRB*, 406 F.2d 886 (6th Cir. 1969); *Chicago Tribune Co. v. NLRB*, 965 F.2d 244 (7th Cir. 1992); *Technology Service Solutions*, 332 NLRB 1096, 172 L.R.R.M.1014 (2000)(purported privacy concerns cited as a basis for dismissing Section 8(a)(1) complaint for the failure of a national computer system company to provide a union with the names and addresses of employees in a multi-state region); *Cf. Charlotte Amphitheater Corp*. 331 NLRB 1274, 169 L.R.R.M. 1254 (2000). In addition, employers frequently invoke the right to privacy as the basis for refusing information demands. See, *GTE California Inc.*, 324 NLRB. 424, 156 L.R.R.M. 1113 (1997)

Time will tell whether employees’ statutory right to privacy will be broadly interpreted by the NLRB to reflect the sentiments of Chief Justice Rehnquist who has expressed strong privacy concerns regarding technologically based access to personal e-mail and telephone conversations. See, *Bartnicki v. Vopper*, 532 U.S. 514, 541-42 (2001)(Rehnquist, C.J., dissenting).

**E-Mail and Workplace Computers**

The proliferation of workplace computer technology has led to the development of NLRB case law and advisory memoranda regarding the right of employees to utilize an employer’s computer network for non-business purposes. In addition to prohibiting discrimination with regard to union-based electronic communications, these opinions and memoranda have concluded that certain employer anti-solicitation policies in computer-based worksites are unlawfully overbroad under the NLRA.

In *E.I. DuPont & Co.*, 311 NLRB 893, 143 L.R.R.M. 1121 (1993), the NLRB held that an employer violated the NLRA when it maintained a discriminatory rule in a chemical plant that prohibited the use of the e-mail system for the distribution of union literature but permitted employer dominated safety committees to utilize the system to communicate with employees. In addition, the record in *E.I. DuPont & Co.* revealed that the e-mail system was an important means of employee communication by which they distributed jokes, poems and comments on various non-work related subjects.

Four years later, in *Timekeeping Systems, Inc.*, 323 NLRB 244, 154 L.R.R.M. 1233 (1997), the NLRB held that a discharged employee engaged in protected concerted activity for the purpose of mutual aid and protection when he sent e-mail messages to other employees regarding a proposed change in vacation policy which had been circulated by the employer via e-mail. The employer’s cover e-mail message encouraged employees to “give me your comments (send me e-mail or stop in to talk to me) by Tuesday, 12/5.” After one employee responded with an e-mail to all the employees praising the proposed change, the discharged employee responded with a lengthy message to his fellow employees expressing criticism of the changes in the terms and conditions of employment.
In 1998, the NLRB found that a discharged employee had not engaged in protected concerted activity under the NLRA where a critical e-mail message was distributed throughout the hospital’s new computer system causing disruption in patient care. *Washington Adventist Hospital*, 291 NLRB 95, 131 L.R.R.M. 1276 (1998). In distributing the message, the employee chose to use a procedure that interrupted all other computer-facilitated communications involving patient care at a peak usage time. The NLRB found that the employee utilized this procedure in order to insure that his message received immediate attention from all hospital personnel who utilized the computer system.

In *St. Joseph’s Hospital*, 337 NLRB 94, 169 L.R.R.M. 1049 (2001), the NLRB held that an employer violated Section 8(a)(1) when it prohibited a nurse during an organizing campaign from displaying a pro-union screen-saver on the hospital’s computer monitor located in her work station while permitting other nurses to display personal screen messages on computers in their own workstations. In addition, the NLRB found Section 8(a)(3) and (a)(1) violations for the hospital issuing a disciplinary warning to the nurse. In its exceptions and supporting brief, the employer argued that the ALJ’s decision should be reversed based on the applicable legal standard for employer bulletin boards. See, *Honeywell, Inc.*, 262 NLRB 1402, 110 L.R.R.M. 1467 (1982), enf’d, 722 F.2d 405 (8th Cir. 1983). In contrast, the General Counsel contended that the applicable standard should be the same for wearing a union pin. Significantly, the NLRB chose not to reach the issue concluding that even if the rules governing an employee’s use of employer bulletin boards was applicable, the record established that the employer’s conduct was discriminatory.

The role e-mail distribution can play during pre-election campaign activities was explored in *Lockheed Martin Skunk Works*, 331 NLRB 852, 164 L.R.R.M. 1329 (2000). In *Lockheed Martin Skunk Works*, supra, during a decertification election campaign, bargaining unit members in favor of decertifying the union, utilized the employer’s e-mail system to send six mass e-mails to over a thousand bargaining unit members. Although the incumbent union objected to the employer about the petitioner’s use of the e-mail system during the campaign, the employer did not take any remedial action despite its non-solicitation and non-distribution policies. In contrast, the employer enforced these policies with respect to other non-work related e-mails. For nearly two months, the union chose not to communicate electronically with bargaining unit members regarding the election. Instead, the union distributed its campaign materials hard copy through interoffice mail, postings on bulletin boards and literature placed on individual desks. Six days prior to the election, the employer granted the union’s request to utilize the employer’s e-mail system to distribute three e-mails to bargaining unit members about the election. In response, the union sent only a single e-mail.

After losing the election, the union filed an objection with the NLRB contending that the employer had engaged in objectionable conduct by failing to enforce its policies toward the mass e-mails sent by petitioner thereby giving the petitioner an advantage in the election. In rejecting this objection, the NLRB majority concluded that the union itself was responsible for the disparity in electronic communications based on the union’s demonstrated preference for traditional hard copy campaign materials. In support of that conclusion, the majority cited to the
fact that the union sent only one mass e-mail after the employer had granted the union the opportunity to send three e-mails.

In addition to NLRB precedent, there have been a series of advisory memoranda from the NLRB’s Office of the General Counsel Division of Advice analyzing various employers’ workplace prohibitions against non-business use of the employer’s computer system under the NLRA.

The most well-known advice memorandum regarding this issue was in Pratt & Whitney, Cases 12-CA-18446, 18772, 18745 & 18863 (Feb. 23, 1998). In Pratt & Whitney, supra, Region 12 sought advice on whether a complaint should be issued against an employer under Section 8(a)(1) for a policy that prohibited all non-business use of e-mail on workplace computers. The Division of Advice concluded that such a ban was overbroad and facially unlawful. See also, Prudential Insurance Company of America, 2002 NLRB LEXIS 551 (ALJ found a violation based on creation and enforcement of an overbroad non-solicitation policy that employer applied to inter/intra-office e-mail system with regard to the union.)

The unfair labor practice charge in Pratt & Whitney was filed by a union that sought to represent employees in the employer’s engineering department. The employer maintained a written policy barring the use of its computer resources for non-business and personal purposes. The engineering employees used workplace e-mail as their primary means of communication and spent a significant amount of work time utilizing computers. In addition, the employer provided lap top computers to ten per cent of the employees so that they can access e-mail from outside the employer’s premises.

In concluding that a complaint should be issued against Pratt & Whitney under Section 8(a)(1), the Division of Advice applied the principles set forth in Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) and Stoddard-Quick Manufacturing Co., 138 NLRB 615, 51 L.R.R.M. 1110 (1962) regarding employee solicitation and distribution on the employer’s property during non-working time. Based on the frequency that the employees utilized the employer’s computers and computer network, the Division of Advice concluded the computers and the “virtual space” constituted a work area under Republic Aviation Corp. and Stoddard-Quick because the network was where employees were productive. See also, Associated Press, Case 9-CA-39211 (Aug. 21, 2002). In addition, the Division of Advice found that although some e-mails could be construed as distribution, other e-mails carried the “indicia of oral solicitation.” Indeed, the memorandum noted that e-mail is frequently interactive, individually targeted and similar to speech.

However, in Associated Press, supra, the Division of Advice memorandum stated that an unfair labor practice charge regarding an employer’s computer use policy should be dismissed where the policy permitted reasonable use of the workplace computers for non-business purposes, provided guidelines distinguishing reasonable and unreasonable use and explained the business reasons for the restrictions regarding the non-business use.
In Computer Associates International, Case 1-CA-38933 (Oct. 26, 2001), the Division of Advice issued a memorandum advising Region 1 to issue a complaint against a software company for its overbroad non-business computer use policies where 100% of the employees utilize the computers for work-related activities. It concluded that the employer’s policy prohibiting all non-business use of workplace e-mail, intranet and internet was overbroad under the reasoning in Pratt & Whitney. The Division of Advice rejected the employer’s property rights argument premised on NLRB precedent regarding other types of employer equipment because such equipment has not been found to constitute an employee’s work area. See, J.C. Penney, Inc., 322 NLRB 238, 153 L.R.R.M. 1207 (1996), enf’d. 123 F.3d 988 (7th Cir. 1997)(employer bulletin board); Champion International Corp. 303 NLRB 102, 138 L.R.R.M. 1295 (1991)(employer copier equipment); Churchill’s Supermarkets, Inc., 285 NLRB 138,126 L.R.R.M. 1085 (1987), enf’d. 857 F. 2d 1474 (6th Cir.1988)(employer telephones); Mid-Mountain Foods, Inc., 332 NLRB 229, 168 L.R.R.M. 1450 (2000)(employer video player). In addition, it concluded that the employer’s policy permitting employees to utilize the employer’s laptops to access and use e-mail and the internet for personal purposes only during “non-business hours” was unlawfully overbroad because it prohibited solicitation at any time including during lunch and other breaks.

However, in situations where employees do not use computer technology as part of their regular work, the Division of Advice has concluded that broad employer prohibitions against non-business use do not violate Section 8(a)(1). See, Jordano’s Food Service, Inc., Case 31-CA-25962 (Jan. 13, 2003)(rule prohibiting employee use of voice mail, e-mail and computers was not unlawful because the technologies were not part of the employees’ work area); See also, GlassWerks SLB, LLC, Case 32-CA-17870 (Mar. 30, 2000); Gallup, Case 16-CA-20442 (Oct. 20, 2000). Nevertheless, a rule prohibiting non-business use of employer technology will be found to violate 8(a)(3) when it is promulgated and implemented in response to a union organizing campaign. Gallup, Case 16-CA-20442 (Oct. 20, 2000).

Employer Videotaping and Photographing

Videotape or photographic surveillance of protected union activity or in retaliation for union activity may be found to violate the NLRA. In Hialeah Hospital, 343 NLRB No. 52, 2004 NLRB LEXIS 637, 176 L.R.R.M. 1254 (2004) the NLRB affirmed an ALJ’s determination that the employer violated Section 8(a)(1) by installing secret videotape equipment in the workplace focused on a leader in the union organizing effort. In addition, the NLRB found that the unlawful videotaping constituted evidence that the union supporter was terminated in violation of Section 8(a)(3).

Employers who photograph or videotape employees engaged in protected concerted activities may be found to have engaged in unlawful conduct unless the employer is able to demonstrate that it had a proper non-discriminatory justification for its conduct. See, Alle-Kiski Medical Center, 339 NLRB No. 44, 2003 NLRB LEXIS 322, 174 L.R.R.M. 1127 (2003); Chester County Hospital, 320 NLRB 604, 153 L.R.R.M. 1175 (1995); F.W. Woolworth Co., 310 NLRB 1197, 143 L.R.R.M. 1187 (1993); Waco, Inc., 273 NLRB 746, 118 L.R.R.M. 1163(1984). Similarly, turning parking-lot video cameras to monitor hand billing, without justification,
constitutes unlawful surveillance under the NLRA. Unbelievable, Inc. d/b/a Frontier Hotel & Casino, 323 NLRB 815, 155 L.R.R.M. 1150 (1997).

Although the NLRB generally finds conspicuous employer surveillance of employee union-related activities on or near the employer's premises to be acceptable, videotaping or photographing is presumed to interfere and restrain employees in the exercise of their Section 7 rights. Basic Metal and Salvage Co, Inc., 322 NLRB 462, 154 L.R.R.M. 1183 (1996); National Tel. Directory Corp., 319 NLRB 420, 150 L.R.R.M. 1290 (1995); Grass Valley Grocery Outlet, 338 NLRB No. 128, 2003 NLRB LEXIS 150, 173 L.R.R.M. 1541 (2003) (NLRB upheld union’s objections and directed a third election where an employer’s agent disrupted a discussion between two union representatives and four employees in a shopping center parking lot). In addition, an employer can be found to violate the NLRA by giving employees the impression that it is closely monitoring their union activities. Garvey Marine, Inc., 328 NLRB 991, 163 L.R.R.M. 1253 (1999); Ichikoh Mfg., 312 NLRB 1022, 144 L.R.R.M. 1243 (1993), enfd, 41 F.3d 1507 (6th Cir. 1994).

Nevertheless, the scope of the NLRA prohibition against videotape surveillance of union activity may be diminishing under the present NLRB. On December 16, 2004, the NLRB issued a decision in Washington Fruit and Produce Co., 343 NLRB No. 125, 2004 NLRB LEXIS 752 (2004) affirming the dismissal of a complaint regarding an employer videotaping a planned high-profile labor demonstration and rally that was scheduled to include high-ranking union movement officials. Despite the context of the demonstration, within a seven-year protracted organizing drive, the NLRB accepted the employer’s claim that it “did not know the purpose of the march” and was purportedly concerned whether the union would not be able to control the crowd. According to the majority, the employer had a “solid justification” for the video surveillance even with the lack of any disruption.

As part of its statutory right to negotiate with the employer and administer the collective bargaining agreement, a union has the right to obtain information from the employer concerning any existing cameras unilaterally installed by the employer. However, the employer may demand bargaining with the union over a confidentiality agreement relating to the release of such information. National Steel Corporation v. NLRB, 324 F.3d 928 (7th Cir. 2003).

The installation and use of hidden surveillance cameras in the workplace has been found to be a mandatory subject of bargaining and the union has the right to bargain regarding the installation and the manner that the surveillance cameras will be utilized. Colgate-Palmolive Co., 323 NLRB 515, 155 L.R.R.M. 1034 (1997). In Colgate-Palmolive, supra, the employer installed surveillance cameras in response to workplace misconduct and for the purpose of disciplining employees. In concluding that the employer’s action was a mandatory subject of bargaining, the NLRB analogized surveillance cameras to other forms of employer infringement on the privacy of employees such as physical examinations, drug and alcohol testing and the use of polygraph testing.

However, the decision in Anheuser-Busch, Inc. 342 NLRB No. 49, 2004 NLRB LEXIS 404, 175 L.R.R.M. 1168 (2004) strongly suggests that NLRB majority in that case believes that
the right of an employer’s right to discipline outweighs the statutory duty to bargain regarding videotape surveillance of employee break areas. In \textit{Anheuser-Busch, Inc.}, the NLRB majority affirmed the ALJ’s conclusion that the employer violated Section 8(a)(5) and (1) of the NLRA by failing to give notice and bargain with the union before installing hidden video surveillance cameras in the workplace. Nevertheless, the majority overturned the ALJ’s decision to vacate the discipline imposed on sixteen employees as a result of misconduct uncovered by the unlawful video surveillance concluding that such a remedy is inconsistent with Section 10(c) of the NLRA. Similarly, in \textit{Hialeah Hospital}, the same majority rejected an ALJ’s recommended bargaining order under \textit{NLRB v. Gissel Packing Co.}, 395 U.S. 575 (1969) where the evidence established that high-level employer representatives embarked on a strong anti-union campaign that included video surveillance and termination of a union leader, informing employees that union activities would be subject to surveillance and warning the entire unit that the employer would terminate those employees who had contacted the union.

\textbf{Global Positioning Systems and Other Human Tracking Devices}

New human tracking technologies permit monitoring in real time and control of human movement outdoors and indoors. These technologies include global positions systems (GPS), indoor sensor networks, radio frequency identification tags (RFID) and other personal location devices.

The most well known tracking device is the GPS. This technology was developed by the United States military to track and locate vehicles and individuals through the use of a network of 27 solar powered satellites circulating Earth. The orbit of the satellites is arranged so that at anytime a GPS receiver on earth can receive signals from at least four orbiting satellites. GPS receivers triangulate the information received from the satellites and establish the geographic location of a vehicle or individual on earth from distance measurements to the satellites. GPS devices can be attached to a vehicle or included in hand-held devices such as a cell phone.

Various media reports confirm that both private and public employers are beginning to utilize this type of technology to monitor and investigate employees. GPS devices are being used increasingly by trucking companies and other employers to monitor drivers. Geller, \textit{New Use of GPS Boost Productivity But Rankle Employees}, Seattle Post-Intelligencer, January 10, 2005; Forelle, \textit{On the Road Again, But Now the Boss Is Sitting Beside You}, The Wall Street Journal, May 14, 2004. Over 100,000 United Parcel Service drivers have been assigned hand-held computers that include a GPS receiver. In addition, E911-capable cell phones that contain a GPS chip can allow employers to monitor an employee’s movement. Koerner, \textit{Your Cellphone Is A Homing Device},” Legal Affairs, July/August 2003; Carvajal, \textit{Cellphone Surveillance in Europe}, New York Times, August 15, 2004.

RFID is another technology being utilized increasingly for human tracking. RFID is a radio-transmitted identification system that uses tags containing computer chips with small antennae that are placed on animals or inanimate objects. These chips are programmed with specific identity information that can be read by an RFID reader. Anyone with a proper RFID reader device is able to obtain the identifying information contained on the RFID tag. Although
the technology was originally designed for monitoring cattle and commercial merchandize, from New York to California school districts are utilizing RFID technology to monitor student movement through mandatory ID badges. Leff, Parents Protest Student Computer ID Tags, Las Vegas Sun, February 10, 2005; Richtel, A Student ID That Can Also Take Roll, The New York Times, November 17, 2004. In the Brittan Elementary School in Sutter, California RFID tags were introduced recently as part of a corporate sponsored experiment aimed at establishing a national market for use of the technology in schools across the nation.

Geography professors Jerome E. Dobson and Peter F. Fisher, both with long professional histories working with geographic information system technologies, have used the label “geoslavery” to describe the application of these new technologies to monitoring and control of humans. See, Dobson and Fisher, Geoslavery, IEEE Technology and Society Magazine, Spring 2003, 22(1), pp.47-52. In their article, professors Dobson and Fisher explore the inevitable nefarious applications of such devices by those with the power or desire to dominate. Although the article does not discuss specifically how private employers in the United States can use these technological devices to enhance workplace domination, they note that the inherent power of the technology can lead to coercive control over human movement and direction. At the same time that they recognize the positive applications for such technology, professors Dobson and Fisher emphasize that the possibility of abuse is so great that safeguards must be developed rapidly in order to avoid Orwellian scenarios.

In a paper presented at the 38th Hawaii International Conference on System Science in January 2005, entitled “Legal and Ethical Implications of Employee Location Monitoring,” Professors Gundars Kaupins and Robert Minch discuss both the moral and legal implications of employers using technological devices to track employees. They set forth various potential justifications for an employer using human tracking devices including: securing propriety information; controlling unauthorized access to secure areas; monitoring job performance and productivity. In addition, they identify various reasons against an employer using such technological tools: an employee’s reasonable expectation of privacy; inaccurate or imperfect information caused by malfunctions or improper use; union use of the technological information to establish inconsistency and discrimination.

Professors Kaupins and Minch outline proposed elements for an employer’s location monitoring policy that should include: the purpose of the monitoring; the technological device(s) to be used; the individuals responsible for the monitoring; who will be monitored; where and when the monitoring will take place; whether the monitoring will be overt or covert; how will discipline be imposed regarding incorrect location.

In their paper, professors Kaupins and Minch identify how an employer may use human tracking technology to enforce policies against distribution and solicitation in the workplace. As an example, they note “(l)ocation monitoring could provide some evidence that employees went throughout the company to distribute union materials at an improper time.” Nevertheless, they recognize correctly that an employer may violate the NLRA by utilizing such devices to monitor union activities because it would lead to unlawful surveillance of lawful union activities.
The use of GPS and other human tracking systems by employers may lead to NLRA violations. For example, a human tracking system can enable an employer to monitor protected activities during non-work time or negotiated leave periods. Through human tracking, an employer would be able to monitor employees visiting union offices and speaking with stewards regarding grievances. Through its very use, human tracking technology will chill protected activities. Obviously, such NLRA violations would result only if the technological surveillance is revealed.

At present, the NLRB has not issued a decision that addresses computer-based human tracking devices. However, in Preferred Transportation, Inc., 2003 NLRB LEXIS 236, 172 L.R.R.M. 1177 (2003), an NLRB administrative law judge admitted and credited GPS data over the General Counsel’s objection and determined that the employer’s data undermined the employee’s testimony regarding his activities on the day in question. Nevertheless, the ALJ concluded that the employer’s decision to terminate the employee for falsifying information on incident reports was unlawfully motivated based on the employee’s protected union activities.

In Roadway Express, Inc, Case 13-CA-39940-1 (April 15, 2002), the Division of Advice tackled the issue in the context of an employer’s duty to negotiate the installation of GPS technology. In Roadway Express, Inc., the advice memorandum concluded that a Section 8(a)(5) charge should be dismissed finding that a Chicago employer did not have to negotiate with the union regarding the installation of a GPS contained in a newly created digital system known as Roadway Digital Dispatch (“RDD”) that was placed in its pick-up and delivery trucks for communication and tracking.

Under the prior practice in Roadway Express, Inc., a driver was required to utilize a two-way radio to maintain contact with a truck dispatcher. Drivers were required to call a dispatcher at specified times each day: a) when leaving the terminal at the beginning of the shift; b) from the first and last stops; c) before and after breaks and lunch; d) when experiencing delays more than 15 minutes; and (e) when returning to the yard. At the end of each shift, drivers were mandated to file a log sheet with the dispatcher.

With the installation of the RDD, the employer was able to eliminate use of the two-way radio and log sheets. RDD enabled a driver and dispatcher to communicate through instant messaging and drivers received pickup and delivery times in real-time. After installing RDD in all of its pick-up and delivery trucks, the employer refused a Teamster demand to negotiate the installation.

In concluding that the Teamsters’ charge should be dismissed, the Division of Advice determined that the installation of the GPS did not result in a significant and substantial change in terms and condition of employment. This conclusion was reached based on the Division’s apparent lack of familiarity with the extraordinary power of this human tracking technology along with its misapplication of NLRB precedent.
In the advice memorandum, the Division of Advice ignored the fact that the GPS technology within the RDD, unlike the two-way radio system, provides the employer with the capability of monitoring the exact location in real time of each driver during daily breaks and lunch period. In addition, it provides the employer with the ability to map every movement of the truck during breaks and lunch. Under the digital system the employer is able to engage in substantially greater surveillance during work time with significantly different information via real time continuous observation. With the GPS, the dispatcher has the ability to dictate the specific route to be taken for each pick up or delivery. Therefore, the Division of Advice’s conclusion that GPS surveillance is not a significant change from the employer’s two-way radio system is factually incorrect.

The Division’s reliance on NLRB precedent regarding time clocks is reflective of the lack of appreciation and understanding of the scope and nature of human tracking technology. In *Rush Craft Broadcasting of New York*, 225 NLRB 327, 92 L.R.R.M. 1576 (1976), the NLRB concluded that the use of a simple mechanical time-clock to replace a handwritten manual system to record an employee’s time at work was an insignificant change from the prior practice. However, in *Vincent Industrial Plastics*, 328 NLRB 300, 163 L.R.R.M. 1123, n.1 (1999) the NLRB distinguished *Rush Craft Broadcasting of New York*, supra. finding a Section 8(a)(5) violation when an employer switched from a time clock system to supervisory monitoring of employees’ time. In reaching its conclusion, the NLRB found that the change was more than mechanical and that it did not provide the employees with a method of challenging inaccuracies in the time records.

Although the GPS technology in *Roadway Express, Inc.* provides the supervisor with substantially greater surveillance power than the prior two-way radio and has the potential to be inaccurate, the Division sought to distinguish *Vincent Industrial Plastics*, supra. based on the erroneous conclusion that the GPS provided “the same information” as the radio system.

In this country, the use of GPS and other tracking devices in the private sector remains unregulated. Four years ago, Congress declined the opportunity to regulate the use of human tracking devices when it failed to enact the Location Privacy Protection Act of 2001 introduced by former North Carolina Senator John Edwards.

The Washington Supreme Court in *State v. Jackson*, 150 Wn. 2d 251, 76 P.3d 217 (2003)(en banc), held that under that state’s constitution, the police were required to obtain a warrant based on probable cause prior to attaching a GPS to a citizen’s vehicle. In reaching its holding, the Supreme Court recognized that the “use of GPS tracking devices is a particularly intrusive method of surveillance, making it possible to acquire an enormous amount of personal information about the citizen under circumstances where the individual is unaware that every single vehicle trip taken and the duration of every single stop may be recorded by the government.” 250 Wn.2d at 262. In *State v. Campbell*, 306 Ore. 157, 759 P.2d 1040 (Ore. 1988), the Oregon Supreme Court held that the police violated the Oregon Constitution by attaching a radio transmitter to a private vehicle without a warrant finding that such surveillance is more intrusive than visual tracking. *Cf. U.S. v. McIver*, 186 F.3d 1119 (9th Cir. 1999); *U.S. v. Moran*, 2005 U.S. Dist. LEXIS 55 (N.D.N.Y., 2005)(a warrant was not required under the
Biometrics

Biometrics is another recently developed technology that can be utilized to identify and monitor individuals. This technological advance has increased the ability of government and employers to implement security protections and time management systems utilizing physical and behavioral characteristics such as finger imaging, handprint, handwriting, iris, retina and voice scan. Many employers are moving from time clocks or sign in sheets to biometric devices to monitor time and attendance. See, Lee, Find Answer to Time Sheet in Technology, Charlotte Business Journal, August 15, 2003; Armour, Biometrics to Imprint Job Site, USA Today, December 5, 2002.

On February 9, 2005, the International Labor Organization’s Seafarers’ Identity Documents Convention 203 (No. 185) came into effect mandating a global biometric system for approximately 1.2 million seafarers. All seafarers’ identity documents under the international convention must conform to a model that mandates the use of a biometric template that stores fingerprints on an internationally standardized bar code.

On the federal and state level, the use of biometric technology has been mandated on regarding public assistance and immigration. For example, the USA PATRIOT Act, 8 U.S.C. §1379, requires the federal government to develop biometric identifier standards for use to verify the identity of visa applicants and other seeking entry into the United States. In addition, the Enhanced Border Security and Visa Entry Reform Act of 2002, 8 U.S.C. §302, states that entry/exit system must use biometric standards beginning on October 25, 2004. Consistent with these legislative measures, on January 5, 2004, the Department of Homeland Security promulgated an interim final rule regarding the implementation of a biometric system for monitoring the entry and exit of aliens from the United States. 69 FR 468 (2004).


In Res Care, Inc., 2001 NLRB LEXIS 397 (2001), an NLRB administrative law judge, relying on the holding in Rust Craft Broadcasting of New York, supra, held that an employer did not engage in an unfair labor practice when it failed to negotiate the implementation of a biometric system that required employees to provide a finger-image when they entered and left the facility. In response to the General Counsel’s argument that finger-imaging in the new biometric system was highly intrusive, the ALJ noted that the record did not include evidence on the question of whether the employer had fingerprinted employees other than through the biometric system. In addition, she found that there was no testimony demonstrating that the
biometric system recorded fingerprints in a manner that would allow it to be utilized in the conduct of disciplinary investigations.

In *CFS North American, Inc.*, 341 NLRB No. 44, 2004 NLRB LEXIS 169, 174 L.R.R.M. 1303 (2004), the NLRB upheld a finding by an administrative law judge that an employer engaged in an unfair labor practice by interrogating and threatening termination to employees who discussed the need for a union following the employer’s introduction of a hand scanner as a security device.

In the public sector, in *State of California (Youth Authority)*, 23 PERC ¶30,114, 1999 PERC (LRP) LEXIS 127(1999), a California state administrative law judge concluded that a public agency engaged in a unfair labor practice when it refused to negotiate in good faith regarding the impact of the decision by the public agency to install a biometric check-in/check-out system in youth detention facilities. The biometric system was intended to replace other less effective tracking systems utilized by the various facilities. Under the system, employees would be required to enter a personal identity number and then touch a fingerprint scanner. The ALJ concluded that the state agency had violated its duty to negotiate in good faith when it refused the union’s request to negotiate the impact of the new system on the privacy of the employees’ fingerprints, the use of the system in disciplining employees and the impact of the delays caused by the new system.

**Genetic Testing**

There are no reported NLRB cases or advisory memoranda with respect to genetic testing under the NLRA.

However, it is reasonable to presume that when the issue of genetic testing is presented to the NLRB, it will rely upon its precedent in the area of polygraph and drug and alcohol testing. In *Medicenter, Mid-South Hospital*, 221 NLRB 670, 90 L.R.R.M. 1576 (1975), the NLRB majority held that an employer violated Section 8(a)(5) when it unilaterally imposed polygraph testing on current employees as part of an investigation into vandalism. The NLRB’s majority found that polygraph testing of current employees was a mandatory subject of bargaining because it constituted a substantially different means of investigating employee misconduct.

In *Johnson-Bateman Co.*, 295 NLRB 180, 131 L.R.R.M. 1393 (1989) the NLRB, relying on the reasoning in *Medicenter, Mid-South Hospital, supra*, held that drug and alcohol testing is a mandatory subject of bargaining because the testing was a new means of investigating employee responsibility for the increase in workplace accidents. In reaching it’s holding in *Johnson-Bateman Co.*, the NLRB concluded that drug and alcohol testing constituted a “relatively sophisticated technology, substantially varying both the mode of the investigation and the character of proof on which an employee’s job security may depend.” In *Tocco, Inc.*, 323 NLRB 480, 155 L.R.R.M. 1138, n.1 (1997), the NLRB ordered the reinstatement with back wages of all unit employees terminated based on the employer’s unilaterally imposed drug policy. Finally, an employee’s distribution of materials to fellow
employees, prepared by a non-union organization supporting a proposed municipal ordinance prohibiting drug testing in the workplace, was found to constitute protected activity within the scope of the mutual aide or protection clause because it related to working conditions. *Motorola, Inc.*, 305 NLRB 580,139 L.R.R.M. 1002 (1991).

Many states and the federal government have already prohibited genetic testing and use of genetic testing results in employment. One of the primary fears underlying the remedial legislation is that employers, in their drive to maximize productivity and profit, will utilize genetic information to make employment decisions, in providing health care and in creating, modifying and applying employment policies. For example, the New York State Legislature concluded that remedial legislation was needed because employers may use genetic testing results as a means of controlling health insurance costs and due to “the possibility that even otherwise healthy individuals will be labeled genetically ‘defective’ and will form a growing ‘genetic underclass’ of society.” N.Y. McKinneys, L. 1996, c. 204.

These prohibitions and restrictions on genetic testing stem from societal concerns about the intrusive nature of genetic testing on personal privacy. As the Ninth Circuit has recognized “(o)ne can think of few subject areas more personal and more likely to implicate privacy interests than that of one’s health or genetic make-up.” *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1269 (9th Cir. 1998); *State v. Morel*, 676 A.2d 1347, 1996 R.I. LEXIS 167 (R.I.1996) (acknowledging legitimate privacy concerns regarding the dangers connected with unauthorized access to genetic information and possible genetic discrimination by employers and insurance companies).

Many state legislatures have concluded that the fact that an individual may have a genetic predisposition to a particular disease does not form a legitimate basis for employment decisions. *See also, International Union v. Johnson Controls*, 499 U.S. 187 (1991)(holding that a chemical company engaged in unlawful gender discrimination by its facially discriminatory policy against women able to bear children premised on the employer’s fear of the health consequences of workplace lead exposure).

In 1996, New York State amended its primary anti-discrimination statute to prohibit employment discrimination based on an individual’s genetic predisposition or carrier status. N.Y. Exec. Law §296(1)(a). In addition, N.Y. Exec. Law §296(19) was added to prohibit employers from soliciting, requiring or administering a genetic test as a condition of employment unless the test is shown to be directly related to the occupational environment or when an employee requests a genetic test and provides written and informed consent.

Unlike polygraph examinations, genetic testing has been found to be scientifically reliable by state legislatures and courts. As a practical matter, DNA evidence is considered the most reliable form of identification evidence and stronger than fingerprints or photographs. See, Green v. Berge, 354 F.3d 675 (7th Cir. 2004). The 2004 arrest of Portland attorney Brandon Mayfield based on a flawed FBI fingerprint analysis confirms the weaknesses inherent in fingerprint identification. See, Heath, Bungled Fingerprints Expose Problems At FBI, The Seattle Times, June 7, 2004. Similarly, genetic testing results are not infallible. Human error and laboratory misconduct can result in false genetic results. See, Anderson, Ex-FBI Laboratory Worker Guilty, Falsified DNA, The Guardian, May 19, 2004 (reporting on the conviction of an FBI laboratory biologist who admitted to intentionally creating over 100 false DNA reports and failing to follow quality control standards to ensure the accuracy of her DNA analyses). See also, State v. Morel, 676 A.2d at1356 (in dicta, the court emphasized its concerns regarding negligent handling of samples by both police and laboratory staff).


Since 1995, the EEOC has interpreted the ADA to prohibit discrimination based on an individual’s genetic profile on the grounds that such an individual is a person regarded as disabled under the ADA, 42 U.S.C. §12102(2). EEOC Compliance Manual, §902.8(a). On April 18, 2001, the EEOC announced the settlement of its first legal action under the ADA challenging an employer’s nationwide policy of testing for genetic markers in blood samples taken from employees who claimed injuries stemming from carpal tunnel syndrome. EEOC v. Burlington Northern Santa Fe Railroad, No. CO1-4013 MWB (N.D. Iowa 2001).

The Supreme Court has not determined whether an individual carrying a genetic marker for a debilitating disease has a disability as that term is defined under the Americans with Disabilities Act (ADA), 42 U.S.C. §§12101, et seq.

In *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, *supra*, the Ninth Circuit reinstated a lawsuit brought by employees of a federally funded research laboratory challenging a pre-placement testing practice in which their blood and urine samples were tested for traits of sickle cell anemia, syphilis and pregnancy. The sickle cell trait is a genetic condition. 135 F.3d at 1265, n. 3.

Although the circuit panel in *Norman-Bloodsaw*, *supra*, affirmed the dismissal of plaintiffs’ ADA claims, it reinstated plaintiffs’ claims for violations of the federal constitutional due process right to privacy and their right to privacy guaranteed under Article 1, §1 of the California state constitution. 135 F.3d at 1275. In addition, the court reinstated plaintiffs’ claims under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e, et seq., that alleged that African-Americans were singled out for sickle cell trait testing and women were singled out for pregnancy testing. 135 F.3d at 1271. In affirming the dismissal of the ADA claims, the court noted that the pre-placement testing was permissible because the ADA does not prohibit post-offer employment entrance examinations that are not concerned solely with the individual’s ability to perform job-related functions. 135 F.3d at 1273.

On May 1, 2003, Congressmember Louise Slaughter re-introduced legislation, H.R. 1910, which would have prohibited employment discrimination on the basis of protected genetic information. A similar bi-partisan bill, the Genetic Information Nondiscrimination Act, passed in the Senate but the House has not acted on the legislation. *See, Genetic Discrimination Bill Stalls in House*, Congress Daily AM April 20, 2004; *Heading off Genetic Bias*, Washington Post editorial, April 26, 2004.

Under §202(a)(1) of the House bill, it would have been an unlawful employment practice for an employer to engage in employment discrimination against any individual “because of protected genetic information with respect to the individual or information about a request for or the receipt of genetic services by such individual or family member of such individual.” In addition, it would generally ban employers from requesting, requiring or obtaining protected genetic information. In certain limited circumstances employers would be permitted to engage in genetic monitoring of biological effects of toxins in the workplace and provide health or genetic services to its employees under §202(a)(3)(A)-(C).

In sharp contrast to the prohibitions against genetic testing and discrimination in employment, throughout the country, genetic testing technology has been successfully
utilized to definitively resolve questions of innocence and paternity. For example, Cardozo Law School's Innocence Project, led by Law Professor Barry Scheck, has been instrumental in utilizing the new technology to help free innocent individuals from death row. See, Dwyer, Scheck and Neufeld, Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted (Doubleday, 2000).

The Use of Technology In The Organizing Context

From captive nations to captive audiences, domination and control over an electoral process by entities with overwhelming power is inconsistent with insuring free and fair elections. Whether the pretext is an authoritarian political theory or a legal theory granting property rights greater weight than statutory associational rights, an election cannot be defined as “free” if the outcome is assured by the domination. The creation of fear of arrest or termination for supporting a party or organization is inconsistent with a truly democratic process. The NLRB’s recent refusal to set aside an election, where the employer coerced employees to wear anti-union shirts at work before the election and provided an Excelsior Underwear list containing 28% erroneous addresses, is an example supporting the conclusion that the NLRB election process is virtually broken. See, Washington Fruit and Produce Co., supra.

Congress has granted the NLRB in Section 9 broad powers to create and apply election procedures that are subject to federal court review. NLRB v. Sanitary Laundry, Inc., 441 F.2d 1368,1369 (10th Cir.1971). Thus far, the NLRB has not applied its broad powers by embracing new technologies as a means of enhancing the potential for free and fair representation elections under the NLRA.

The remedial orders issued in E.I. DuPont & Co., supra. and Timekeeping Systems, Inc., supra. are reflective of an NLRB institutional reluctance to change based on the development of new workplace technologies. Despite the centrality of workplace e-mail communications in both cases, the NLRB’s decisions included only the boilerplate language for the notice to be posted in conspicuous places with the employer taking steps to ensure that the notices are not altered, defaced, or covered by any other material. However, if the purpose of the posting requirement is to rectify a violation related to electronic communications, an NLRB requirement that the notice be scanned, electronically posted and distributed through the computer system would be reasonable. Nevertheless, the NLRB’s recent rejection of access and notice remedies proposed by the General Counsel to rectify a series of gross unfair labor practices demonstrates that it is unlikely that the NLRB, in the near future, will be moving away from the out-dated posting remedy. See, First Legal Support Services, LLC, 342 NLRB No. 29, n.6, 2004 NLRB LEXIS 358, 175 L.R.R.M.1141 (2004).

In contrast to the NLRB, the National Mediation Board (NMB) in 2002 adopted the use of advanced technology that has been used in shareholder and organizational membership voting for conducting representation elections. 29 NMB No. 90 (2002). In the first year, NMB held 26 elections utilizing the technological system known as Telephone Electronic Voting (TEV) that allows voting twenty-four hours 7 days a week during an extended voting period. Under NMB’s initial procedures, each eligible employee was mailed a secret voter identification number (VIN)
along with a personal identification number (PIN) based on the last four digits of the employee’s Social Security number. During the voting period, after the voter telephones NMB through a toll free number, the voter verifies his or her identity by entering both identification numbers. After the employee casts the vote, he or she receives a confirmation number.

In Association of Flight Attendants, 30 NMB 1 (2002), the NMB rejected, based on its broad discretion under the Railway Labor Act (RLA), an employer’s claim that the agency lacked the statutory authority to use the TEV system. NMB also rejected the employer’s concerns regarding TEV security. With respect to concerns about hacking, NMB noted that the computer system contains various overlapping security systems and backup systems to render it tamper proof. These security systems include a firewall, an intrusion detection system and preventive technology to stop interception by passing encrypted information between the browser and web server. With respect to the employer’s expressed concerns about stolen identification numbers, NMB found that the potential for voter fraud is equally as great in a mail ballot election.

On September 30, 2003, following receipt of comments from management and labor regarding the TEV system, NMB announced certain modifications to the telephone electronic voting system. 30 NMB 481 (2003). To enhance the system’s security, NMB abandoned the use of an employee’s Social Security number to create a PIN. Under the modification, both the VIN and PIN number would be created randomly. In addition, NMB shortened the voting period to 21 days.

The NMB’s TEV system includes qualities that improve the chances for free and fair representation elections. It eliminates the employer’s inherent domination found in most traditional elections by moving the voting off-site. In addition, it expands the period of time for voting thereby giving employees a greater opportunity to make a free choice. Finally, it has the potential of substantially diminishing the adverse impact of employer’s unfair labor practices.

The nature of the NLRB’s response to technological changes is reflected in its rejection of alternative means for a union to contact employees in decentralized computer-based workplaces. See, Technology Service Solutions, supra. In Technology Service Solutions, the NLRB dismissed a Section 8(a)(1) charge based on the refusal of a multi-state computer system installation employer to provide the union with a list of names and addresses of employees despite the vast geographic dispersion of unit employees. In rejecting the claimed violation, the NLRB relied on the employer’s assertion of a right to privacy and the property rights principles set forth in Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992) and NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

In the present climate, it is unlikely that the NLRB will reconsider the tilted balance in favor of employer property rights over statutory associational rights. Nevertheless, in light of the de minimus computer space occupied by most e-mails it is worth considering whether an NLRB mandate requiring an employer to permit the union to distribute campaign e-mail through its computer system would enhance the free flow of information in a technologically based workplace. Lockheed Martin Skunk Works, supra, demonstrates that workplace computer
systems can be useful for pre-election campaigning. Through mandated or negotiated reasonable limitations on the amount and size of cyber-campaigning, along with the use of encryption technology, the NLRB representation process can be transformed into a more democratic process.

Conclusion

New technologies can either benefit or endanger the vitality of the NLRA. How the NLRB and the courts approach these new technologies may determine whether the NLRA’s mission is busy being born or simply dying. By harnessing modern technological tools, the NLRB can enhance the central mission set forth in Section 7. In contrast, if the NLRB and the courts determine that common law property rights grant employers the power to utilize technology for human tracking and other invasions into employee privacy, a law born to grant freedom to employees may be turned into a law permitting technological oppression by employers.